R.D. # 0003-99
Passaic, New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

THE GENERAL HOSPITAL CENTER AT PASSAIC Employer	
and	CASE 22-RC-11679
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] Briefs filed by the parties have been fully considered. Subsequent to the close of the hearing, the Employer filed a Motion to Reopen the Record so that it may submit evidence as to the hours actually worked by the per diem operators through February 1999. That Motion is denied for the reason that the evidence to be submitted is not probative to my decision.

2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The labor organization involved claims to represent certain employees of the Employer.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

> All full-time and regular part-time skilled maintenance employees including all boiler operators, carpenters, electricians, groundskeepers, plumbers, general maintenance mechanics, HVAC mechanics, painters and stationary engineers employed by the employer at its Passaic, New Jersey facility, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act and all other employees.[5]

There remains for consideration the status of certain boiler operators[6] whom the Employer, contrary to the Petitioner, would exclude as per-diem employees. The Petitioner asserts that these boiler operators are regular part-time employees who should be included in the unit described above. There are approximately five part-time boiler

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[2] The Employer is a New Jersey corporation engaged in the operation of an acute care hospital providing health care and related services at its Passaic, New Jersey location, its only location involved herein.
[3] The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
[4] The unit description is in accord with the stipulation of the parties which I find to be appropriate for purposes of collective bargaining.
[5] There are approximately 12 employees in this unit.
[6] The Employer does not use any per-diem employees for maintenance work.

operators who are at issue here. The Employer refers to them as the per-diem employees. I will refer to them in this decision as the per-diem operators.

The Employer is engaged in the operation of an acute care hospital providing health care and related services. It employs four full-time boiler operators and eight full-time maintenance employees. The Employer also maintains a roster of employees who are called to fill in for full-time boiler operators who have scheduled vacation time in advance or some other scheduled leave.[7] Boiler operators are scheduled to work eight-hour shifts, each shift for the most part being staffed by one operator at a time. The record reveals that the Employer has utilized the services of approximately five per-diem operators since last fall. In this regard, the record discloses that two of the per-diem operators have worked for the Employer since September 1998, and two other operators since October 1998.

The Petitioner asserts that per-diem operators should be included in the unit. In this regard, it notes that the per-diem operators perform the same job functions and work under the same supervision as the full-time operators. Although the Employer contends that the per-diem operators are not generally used to fill in for full-time operators who call in sick, the record disclosed that if a full-time operator is going to be out sick for an extended period of time, the Employer will utilize a per-diem operator for the duration of the full-time operator's absence. The record discloses that the Employer pays the per-

[7] The record does not indicate any set amount of time as to when the Employer calls one of the per-diem operators into work; rather; notice varies depending upon when the Employer learns that one of the full-time operators is scheduling leave.

diem operators one additional half-hour for lunch per each eight-hour shift worked.[8] The Employer also pays the per-diem operators what it terms a "weekend differential," in that per diem operators who work an eight hour shift on a weekend are paid for an additional eight hours. The record is unclear as to whether the full-time operators receive such benefits. The record reveals that all five of the per-diem operators earn $17.40 per hour, while the full-time operators earn between $17.26 and $22.04 per hour. The per-diem operators are on the same payroll as the full-time operators, and the Employer withholds social security and other payroll taxes from the per-diem operators' paychecks. The record also reveals that one eight-hour shift each week is regularly scheduled to be worked by one of the per-diem operators. Although there is one per-diem operator who has consistently worked that shift, evidence presented by the Petitioner indicates that the Employer may soon begin scheduling other per-diem operators to work that shift as well.

The Petitioner also presented evidence that one of the full-time operators, Frank Thoma, in addition to having accumulated five weeks of vacation per year, is also a member of the U.S. Naval Reserves. As such, Thoma is granted time off work for one weekend each month, with the additional potential of having to serve several weeks in the reserves in addition to the one weekend per month. The Petitioner contends that the time that Thoma is away would necessitate the Employer's scheduling of per-diem operators to cover Thoma's scheduled shifts.

The Employer, for its part, does not agree that the per-diem operators should be included in the unit. It points out that per-diem operators do not work regular hours, but

[8] Boiler operators are paid this extra time because they do not receive a lunch break while performing their

rather work only as needed. The Employer asserts that there was a substantial need for per-diem operators at the end of 1998, due to a change in its vacation policy for the full-time operators.[9] It therefore does not anticipate utilizing the per-diem operators as frequently in the future. Furthermore, when called, a per-diem is free to accept or reject a shift assignment. The Employer contends that the per-diem operators have no expectation of regular employment, and in fact several of the per-diem operators hold jobs with other employers. Per-diem operators do not receive fringe benefits enjoyed by the full-time operators, such as life insurance and dental benefits.[10] Although the Employer did not introduce evidence indicating how much vacation time the full-time operators have accrued, the record reveals that the full-time operators each receive between three and five weeks of vacation time per calendar year.

With respect to the Employer's contention that the per-diem operators are not regular employees, it submitted payroll records at the hearing for the eight bi-weekly pay periods from October 11, 1998 through January 30, 1999.[11] These records disclose that four of the five per-diem operators were employed during this time frame.[12] I have prepared the following chart which lists each per-diem operator and the number of hours

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shifts.

[9] In 1998, the Employer's vacation policy changed so that full-time employees were permitted to carry only approximately 32 hours of vacation time into 1999. As a result, all accumulated vacation time above that amount would have to be used or forfeited.

[10] The Employer's witness also testified that per-diem operators are not entitled to annual raises, will not receive uniforms as the full-time operators will, and do not attend the Employer's Christmas party, department meetings or other social events. One of the Union's witnesses testified that per diem operator Thomas Christian had attended a departmental meeting that had been held approximately one week prior to the Board hearing.

[11] Payroll records for Luis Mora were submitted only for the period November 8, 1998 to January 30, 1999, and for Donald Garretson for the period October 25, 1998 to January 30, 1999.

[12] Per-diem operator Luis Mora commenced his employment on October 19, 1998.

he worked[13] during each bi-weekly pay period during the October 11, 1998 through January 30, 1999 time period.[14] The last column represents the average number of hours per week by these per-diem operators during the relevant period.[15]

NAME	10/11/98	10/25/98	11/8/98	11/22/98	12/6/98	12/20/98	1/3/99	1/17/99	AveHrs[16]
Garretson	x	2	0	8	12	8	0	4	4.86
Goral	0	0	0	15.38	16	4	0	4	4.92
Mora	x	x	22.25	16	8	12	8	0	11.04
Salvador	0	3	12	3.1	8	12	4	0	5.26

Although the Employer did not submit payroll records for per-diem operator Thomas Christian, the record reveals that Christian is scheduled to work regularly for at least one eight-hour shift per week, the first shift every Sunday. Evidence presented by the Petitioner indicates that from the period November 2, 1998 to February 14, 1999, Christian worked approximately 17 shifts alone, and approximately seven shifts with one

[13] Hours worked include only those hours actually worked. It does not include hours paid for under the weekend differential policy, or the half-hour paid for lunch.
[14] Of the five per-diem operators, payroll records for four were introduced into evidence. The one per-diem operator for whom there are no records is Thomas Christian.
[15] This calculation was determined by adding the total number of hours worked by each per-diem operator and dividing that sum by 16, which is the number of weeks during the pay period October 11, 1998 to January 30, 1999. Mora's total number of hours was divided by 12, and Garretson's by 14, since those were the number of weeks for which the Employer provided payroll records for those employees.
[16] Although the Employer did not submit payroll records for the month of February 1999, the Employer did submit a schedule of days per-diem operators were scheduled to work in February, which indicates that Christian was scheduled to work approximately three shifts, and Garretson approximately one shift.

other per-diem operator.[17] In addition, Christian testified that upon commencing his employment, he informed the Employer that because of a state licensing requirement for a license he was seeking, he would need to work a substantial number of hours in order to meet that requirement. The Employer had no objection to scheduling Christian for the requisite number of hours. Christian further testified that he was scheduled to work many hours at the beginning of his employment, and that it was at his behest that the number of hours he worked were reduced, so that he would only be scheduled to work one shift per week.[18] Christian testified that he had no reason to believe that the Employer would reduce his hours in 1999 from the one shift per week previously agreed to with the Employer.[19]

In determining the status of per-diem employees in the health care industry, the Board has utilized various eligibility formulae as guidelines to distinguish "regular" part-time employees from those whose job history with an employer is sufficiently sporadic that it is most accurately described as "casual." *Sisters of Mercy Health Corp., 298 NLRB 483 (1990).* In *Marquette General Hospital, 218 NLRB 713, 714 (1975),* the Board devised an equitable formula that was designed to determine eligibility when the facts indicated that there was significant disparity in the number of hours worked by that employer's on-call nurses. For instance, in *Marquette,* some on-call nurses worked as many as 540.5 hours per quarter, while others worked as few as 23. However, when the on-call employees, as a group, all appear to work on a regular basis, the Board usually

[17] This evidence was in the form of a logbook maintained by the Employer for the operators to sign at the end of their shifts to record any events that happen during the shift. All operators, full-time and per-diem, sign the logbook at the conclusion of their shifts.
[18] Christian testified that since he was retired, he did not wish to work more than one shift per week.
[19] In its post-hearing brief, the Employer agreed that Christian should be included in the unit.

has found a more liberal standard applicable. See, e.g. *Davison-Paxon Co., 185 NLRB 21, 24 (1970); V.I.P. Movers, 232 NLRB 14, 15 (1977); Riverside Community Memorial Hospital, 250 NLRB 1355, 1356 (1980); West Virginia Newspaper Publishing Co., 265 NLRB 446 (1982).* See also *Newton-Wellesley Hospital, 219 NLRB 699, 703 (1975).* In *Sisters of Mercey,* where the on-call nurses worked on a regular basis and there was no evidence of the significant disparity in the hours worked of the on-call nurses as found in *Marquette*, the Board found the *Davison-Paxon* formula to be more appropriate. As a result, on-calls were found to be eligible if they regularly averaged four hours or more per workweek during the quarter prior to the eligibility date. *Sisters of Mercy at 484*. Interestingly, the Board has rejected any suggestion that there should be a recurrency of employment factor included in the *Davison-Paxon* formula. *Trump Taj Majal Casino Resort*, *306 NLRB 294 (1992).* Therefore, like *Sisters of Mercy, supra,* the per-diem operators here have exhibited a degree of regularity in their work hours and further noting that there is no evidence of a significant disparity in the hours worked, I find that it is appropriate to apply the *Davison-Paxon* formula in the instant situation.

In the present matter, there is one per-diem operator, Christian, who has worked a regularly scheduled eight-hour shift each week since his hire at the end of September 1998. As such, Christian is deemed a regular part-time employee and is therefore included in the unit. As for the remaining four per-diem operators, the Employer contends that since these employees will not be utilized as frequently in the future, they should not be included in the unit. The Petitioner, in its brief, urges that in deciding whether to include these operators, it is not only the number of hours worked in the past that should be considered, but also the number of hours that these operators will work in

the future. It is clear from the record that these operators each averaged more than four hours per week for the time in which payroll records were submitted.[20]

To this end, the record reveals that two of the four full-time operators will earn five weeks of vacation in 1999, one will earn four weeks and the fourth will earn three weeks. Although one or more of the per-diem operators may work sporadically in 1999, collectively, they will cover a total of 680 vacation hours in 1999, or 56.66 hours per month. When divided amongst the four per-diem operators, each will cover an average of 14.17 hours each month for vacation time. In addition to the vacation time coverage, the record reflects that the per-diem operators will also cover any scheduled personal days used by full-time operators, extended sick leave absences, coverage for Thoma's military leave and holiday leave that is earned by the full-time operators. Although it is impossible from the record to determine exactly how many hours each per-diem operator will work in 1999, when the average potential time that each per-diem operator will cover is added together, it is reasonable to assume that that time will continue to exceed the four hours per pay period standard under the *Davison-Paxon* formula, as was the case at the end of 1998.

Of course, the above presumes that the per-diem operators have a sufficient community of interest with the full-time operators to be included in the first place. Besides the standard considerations of interchange, etc., the Board will also look at the ability of an employee to accept or reject employment as a relevant, but not determinative, factor. *Pat's Blue Ribbons, 286 NLRB 918 (1987); Tri-State*

[20] It is not possible to consider any time period prior to September 1998, since the Employer did not

Transportation Co., 289 NLRB 356, 357 (1988). In this regard, the record disclosed that the per-diem operators perform work identical to that of the full-time operators, and under the same supervision. The record also clearly demonstrates that while the number of hours each per-diem operator works fluctuates from week to week, all five of the per-diem operators worked regularly over a period of several months prior to the hearing and will continue to do so. While the per-diem operators do not share the same fringe benefits and possess a certain flexibility in acceptance of shifts, I find that these factors do not detract from the substantial community of interest they share with the other unit operators. Under these circumstances, I find that the per-diem operators possess a substantial community of interest with the regular full-time and part-time operators and are therefore properly included in the unit found appropriate herein. *St. Francis Hospital, Inc.*, *supra; Milwaukee Children's Hospital Assn., 255 NLRB 1009 (1981); Newton-Wellesley Hospital, supra.*

DIRECTIONS OF ELECTION

Elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notices of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12

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employ any per-diem operators prior to that date.

months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Union of Operating Engineers, Local 68, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).* Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters, for each unit herein, shall be filed by the Employer with undersigned, who shall make the lists available to all parties to the election. *North Macon Health Care Facility, 315 NLRB 359 (1994).* In order to be timely filed, such lists must be received in the NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before March 8, 1999.

No extension of time to file these lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by March 15, 1999.

Signed at Newark, New Jersey this 1st day of March 1999.

/s/ William A. Pascarell

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